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Janet C. CHECKLEY

Nadja ALEXANDER

Singapore Management University, nadjaa@smu.edu.sg

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SPECIAL REPORT: INTERNATIONAL DISPUTE RESOLUTION

[1612 words]

Arb-med-arb in cross-border disputes

by Janet C Checkley and Nadja M Alexander

To satisfy the needs of an increasingly diverse set of legal cultures meeting in the global marketplace today, dispute resolution mechanisms must continually evolve. One of the recent solutions to arise out of the blending of legal cultures is evolutionary rather than revolutionary, because it is in fact not new at all: multi-tiered dispute resolution.

The simple idea behind multi-tiered dispute resolution is to provide several possible avenues to dispute settlement within one dispute resolution procedure. The result is a mechanism that combines various dispute resolution methods such as mediation and arbitration in different ways.

Clauses incorporating multi-tiered dispute resolution are a recent development in commercial and cross-border contexts. Yet in some parts of the world, such as mainland China and other civil law countries, it is standard for judges and arbitrators to attempt to facilitate settlement in the course of trial and arbitration.

Multi-tiered dispute resolution provides a dynamic solution for cross-border disputes; it combines the flexibility of negotiation and mediation with the promise of finality and expedited enforcement through arbitration under the UN Convention for the Recognition and Enforcement of Foreign Arbitral Awards. It also presents a unique set of considerations for parties to navigate.

The Keeneye Case

In April 2011, a minor shockwave rippled through the commercial dispute resolution community when the Court of First Instance (CFI) in Hong Kong refused to enforce an arbitration award on public policy grounds.

The case concerned the validity of a share transfer agreement and was brought to arbitration under the Xi'an Arbitration Commission (XAC) rules in the People's Republic of China. The XAC Rules contained a clause granting the arbitrators broad authority to act as conciliators (or mediators) and propose settlement agreements. During an adjournment in arbitration proceedings, a member of the tribunal contacted a lawyer for the respondent and invited him and a friend of the respondent, Zeng, to a meeting. Over dinner at the Shangri-La Hotel, the secretary-

general of the XAC conveyed that the tribunal took the respondent's position and regarded the share transfer agreement to be valid, but that the tribunal wanted the respondent to consider compensating the claimant by a certain amount to settle the dispute. Zeng agreed to convey the tribunal's view to the respondent. Though the respondent was satisfied that the tribunal took its view of the share transfer agreement, it ultimately disagreed with the proposed compensation. The arbitration resumed, and – much to the respondent's surprise given the information relayed after the Shangri-La meeting – the tribunal issued an award favourable to the claimant that the share transfer agreement was not valid.

The respondent first appealed the award to the Xi'an Intermediate People's Court on grounds of bias, pointing to the informal dinner meeting at the Shangri-La. The claimant contended that the meeting amounted to a mediation under the XAC rules. The court agreed with the claimant, and finding no apparent bias, upheld the award.

But, when the claimant proceeded to enforce the award in Hong Kong, the respondent again challenged the enforcement. In considering whether or not the Shangri-La meeting amounted to a mediation, the CFI in Hong Kong considered numerous factors including the apparent absence of party consent to the “mediation” and the “mediator” and the fact that one party apparently was not represented at all at the meeting. It held in *Goa Haiyan v Keeneye Holdings Ltd* that the events at the Shangri-La Hotel would give a fair-minded observer “a palpable sense of unease” that would cause such an observer to apprehend a “real risk of bias”. The court refused to enforce the award.

International law firms quickly published updates on their websites with titles like ‘The Dangers of Arb-Med’, and rushed to assure clients nervous about their own awards that the CFI had confirmed there was “nothing wrong in principle” with med-arb (mediation followed by arbitration) or arb-med-arb (mediation taking place after arbitration has commenced) proceedings. Observers noted that the decision highlighted “the difficulties that can arise when different cultures of conflict resolution rub up against one another” and emphasised the need for clients and practitioners to carefully follow appropriate protocols to ensure procedural fairness when combining arbitration and mediation.

In the end, the Hong Kong Court of Appeal set aside the lower court's decision on the grounds that there was no finding of apparent bias, and that the respondent had effectively waived its opportunity to object to the proceedings when it did not do so before arbitration had commenced. Nevertheless, the main takeaway from *Keeneye* continued to reverberate: when it comes to multi-tiered dispute resolution proceedings, proceed with caution.

Different legal culture, different approach

The differing cultural attitudes toward multi-tiered dispute resolution explain in part why the Xi'an Intermediate Court in the People's Republic of China (a civil law jurisdiction) upheld the tribunal's award, and why the CFI in Hong Kong (a common law jurisdiction) ruled that the award was unenforceable there on public policy grounds. Yet, despite any lingering doubts regarding enforceability or bias following the *Keeneye* case, multi-tiered dispute resolution is on the rise

around the world.

Nowhere is this more visible than where cultures converge through cross-border business and the settlement of cross-border disputes. In that crux we find a useful context through which to regard one of the latest and most promising innovations in multi-tiered dispute resolution: the SIAC-SIMC Arb-Med-Arb (AMA) Protocol.

Features and advantages of the AMA Protocol

The AMA Protocol is the result of careful collaboration between two dispute resolution institutions in Singapore: the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC). The Protocol proceeds in roughly three stages. After proceedings have been initiated and the arbitral tribunal has been constituted, the tribunal will issue a stay of the arbitration. At that time, the SIAC will automatically refer the case to the SIMC for mediation. The SIMC will administer mediation proceedings, which are to be completed within eight weeks of the referral from SIAC. If the parties successfully settle their dispute in mediation, they may request the arbitral tribunal to issue a consent award following the terms of their settlement. If the parties are not able to resolve their dispute in mediation, the arbitral tribunal will lift the stay of arbitration and resume arbitration proceedings.

The AMA Protocol may be adopted by the agreement of the parties at any time during the arbitration proceedings, or may be incorporated by reference into a dispute resolution clause in the underlying contract between the parties. The AMA Protocol retains a strict timeline for compliance and makes use of triggers such as the automatic referral to SIMC once the arbitral tribunal has issued a stay of arbitration. The SIAC administers all fee collection on behalf of itself and the SIMC, so that parties do not need to pay more than one set of fees for the entire proceeding. Further the division between arbitration and mediation proceedings is strictly observed under the Protocol: arbitrators do not act as mediators for the parties, and the mediation is administered by the SIMC separately from the arbitration proceedings administered by the SIAC.

The AMA Protocol offers the best elements of mediation and arbitration while minimising the risks exposed in the *Keeneye* case. It ensures flexibility and reduces the costs and time barriers usually associated with switching between dispute resolution methods. It guards against potential apprehension of bias by keeping the arbitration and mediation proceedings entirely separate from one another. Under the Protocol, mediation does not commence until after arbitration proceedings have been initiated. This helps to clarify the issue of whether the arbitration proceedings arose out of a dispute between the parties. Finally, the AMA Protocol provides the parties an opportunity to arrive at a settlement agreement, parts or all of which may be issued in the form of an award; this is significant, as research suggests that compliance rates with settlement agreements are higher than compliance rates with arbitral awards. Together, these factors make the AMA Protocol the new 'gold standard' for multi-tiered dispute resolution.

Limitations associated with arb-med-arb?

Potential limitations may exist regarding the converting of a settlement agreement into an arbitral award. In mediation, parties may agree to any settlement that best addresses their interests and needs. Under international arbitration proceedings, however, tribunals are bound to issue an award in compliance with the substantive law governing the dispute and within the powers granted to the tribunal by the parties' agreement under the applicable arbitration law. It is conceivable therefore that parties may agree to terms not all of which are capable of inclusion in an award. One way to address this risk is for parties to agree on the aspects of the settlement agreement that are to be issued as an award and those that are to remain in contractual form.

Future directions

As to the future, the forthcoming UNCITRAL Convention on the Enforcement of International Settlement Agreements Resulting from Mediation (known as the Singapore Convention on Mediation) will offer expedited enforceability for international mediated settlement agreements that arise out of standalone mediations. This convention is likely to encourage the use of mediation in cross-border settings: both stand-alone mediation and mediation within arbitration proceedings.

In mediation, however, there is no guarantee that parties will reach a settlement. In this regard, the AMA Protocol still offers an added benefit: in the event that the parties do not reach a settlement, the protocol offers reassurance that the dispute will move promptly to an arbitration hearing. Singapore's AMA Protocol provides the most advanced iteration of multi-tiered dispute resolution which parties in cross-border disputes can look to for guidance in a culturally shifting and increasingly convergent world.

Janet C. Checkley is a researcher at Singapore International Dispute Resolution Academy (SIDRA) and Nadja M. Alexander is the Director of SIDRA at Singapore Management University. Ms Checkley can be contacted on by email: learning@sidra.academy. Prof. Dr. Alexander can be contacted on [+65 6828 9633](tel:+6568289633) or by email: nadja@sidra.academy.